EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JAVIER CASTILLO MARADIAGA,

Plaintiff,

v. 21 CV 842 (KPF)

THOMAS DECKER, *et al.*,

Defendants. Decision
(via Microsoft Teams)
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New York, N.Y.
March 4, 2021
4:05 p.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

ALINA DAS
PAIGE AUSTIN
Attorneys for Plaintiff

AUDREY STRAUSS
United States Attorney for the
Southern District of New York
REBECCA FRIEDMAN
Assistant United States Attorney

(Case called)

MS. AUSTIN: Good afternoon, your Honor, Paige Austin from Make the Road New York, and I am joined by my cocounsel, Alina Das, from the immigrants rights clinic at the New York University School of Law, also on behalf of petitioner.

THE COURT: Thank you, and good afternoon to you both.

Ms. Friedman representing the government.

MS. FRIEDMAN: Yes. Rebecca Friedman, your Honor, representing the government.

THE COURT: Thank you as well. Thank you for participating, especially given the lateness of the hour.

I do have a decision. It is an oral decision. And as a result of that, I would show you, but there are a lot of highlights and circles and arrows and it may not be the best prose, but it is, I believe, what is the best result in this case. Before I render that decision there are a few questions that I wanted to ask you about recent developments.

Ms. Austin, I'll ask you, and you'll defer to Ms. Das if it is appropriate.

There was a hearing that occurred on Tuesday regarding a possible bond application. The application was denied. Because it's an area with which I am unfamiliar, this Third Circuit convention, when there is such a hearing, are there actually conditions that are proposed or does the immigration judge, or whomever, agree to the concept of a bond and let the

parties figure out what is an appropriate level?

MS. AUSTIN: That is a good question, your Honor, and I think could be answered in two ways. The first is what the immigration judge would have the authority to do and the second is what he did in this case.

We certainly think that the immigration judge does have the authority to set conditions. However, that is a matter of some disputed practice in the immigration court and I do not believe, and my cocounsel, Ms. Das, can correct me if I am wrong, but I do not believe in this case the immigration judge considered any alternatives to detention or any conditions of release apart from a monetary bond.

THE COURT: I see. What is apparently not an analogue, which is the criminal setting that I face, it is often the case that when a bail package or bail argument is had, there is a proposal from which one begins. It is not just the idea of bail, no bail. The defendant's counsel will propose terms of bail that they submit meet the requirements of the Bail Reform Act.

Here, are you saying to me that the IJ could have got to that point but did not in fact get to that point and, therefore, there never were conditions discussed?

MS. AUSTIN: I can certainly represent that there were no conditions discussed and that that is something, you know, that could be considered. So I think that your Honor is right,

but I do want to give my cocounsel an opportunity to weigh in here if she has a different view on the matter.

THE COURT: Ms. Das.

MS. DAS: Yes, your Honor. My cocounsel is right.

I just would underscore that in this particular instance many immigration judges believe that they don't have the power to consider alternatives to detention, such as electronic monitoring or other conditions, in addition to a monetary bond, and that this judge in particular has taken that position in the past, which is why we assume he did not consider it here. That issue has been litigated in other cases.

So, for example, in the case that we cited in our most recent letter today, the *Uzmande* case, this judge in particular was faulted for not having considered alternatives to detention as part of his analysis in a Guerrero-Sanchez bond hearing. It is an issue of dispute, and I think that is one of the reasons why we have these administrative bond hearings. This was a far cry from the type of constitutionally adequate bond hearing process that our clients often seek.

THE COURT: I am going to hear from Ms. Friedman in a moment on this topic.

But before I do, Ms. Austin, you did send me the letter. Each of you has sent me a number of letters. I commit to you that I've read them.

But what is it that you would like me to deduce from the letter regarding the bail hearing? I intuit that one of the things you want me to understand is, he's not been released on bail, *Mapp* relief would be really nice. But I want to understand what, if anything, you are asking me to understand from that bail application and its failure.

Ms. Friedman, to the extent there is something you want me to understand from what happened at that hearing, you will let me know.

Ms. Austin.

MS. AUSTIN: Thank you, your Honor. We did send you two -- we filed two letters since that hearing took place. The first was simply to apprise the Court that he had not been released and the *Mapp* claim for that reason does remain live. It was not mooted out by the outcome of that hearing.

We went on to respond to the government with I think some additional important takeaways from our perspective.

First, of course, the bond hearing and indeed the *Mapp* requests have no bearing on the primary forms of relief at issue here, namely, the stay that Mr. Castillo seeks for the duration of his petition.

Second, we wanted to make the point that he does continue to seek, as a secondary form of relief, release on *Mapp* for the duration of this petition, and that is analyzed under a different standard and, obviously, by your Honor, a

different court, than the bond hearing analysis that occurs in the administrative proceedings.

Our position is that it really does not have any bearing on the *Mapp* analysis, but we did want to make that point to your Honor and also to underscore some of the issues that arose in the bond hearing in our most recent letter, again, not because we are seeking review of that bond hearing before this Court or, you know, essentially seeking, for example, an appeal through this court.

We submitted those points for your Honor only in response to what he understood to be the government's suggestion that this might in some way bear on Mr. Castillo's claims to relief. Our position here is that it does not, though, of course, it is relevant inasmuch as the issue of release under *Mapp* remains before your Honor.

THE COURT: Thank you.

Ms. Friedman, just following on what Ms. Austin was saying, are you making arguments to me today regarding the instant motion for a preliminary injunction based on what happened at that hearing on Tuesday?

MS. FRIEDMAN: No, your Honor.

THE COURT: That's the answer. I didn't want to cut you off if there was something you wanted to add.

MS. FRIEDMAN: No. I would just like to answer the question that your Honor had posed to the petitioner.

THE COURT: Yes.

MS. FRIEDMAN: The IJ in this case found that ICE had met their burden of finding that petitioner is a danger to the community. And based on that fact, he did not need to go into any other alternatives.

THE COURT: Thank you.

Ms. Friedman, you are doing very well. Your answers are leading to my follow-up questions.

You've advised me about the charges that were brought by the district attorney and that were later dismissed and the reasons why they were dismissed.

If you know, are you suggesting to me that if I were to let Mr. Castillo out on *Mapp* release that the DA's office would reinstate the charges? I ask this not knowing whether they have an inclination to do so, whether they have the ability to do so. But I did not know if one of your reasons for sending me that letter was to let me know that *Mapp* release would be futile because he would just get picked up by the DA's office anyway.

MS. FRIEDMAN: I have no knowledge of what the DA's office plan would be if he were to be released.

THE COURT: Thank you.

You heard me ask Ms. Austin what I am to intuit from her letter. I ask you the same. What do you want me to know as I make this decision on the motion for a preliminary

injunction regarding the fact of his arrest and what you now understand to be the reasons why the charges were dropped?

MS. FRIEDMAN: Sure. In the oral argument I talked a lot about the factors that the field office director and the ombudsman considered, the criminal charges, the backgrounds. So this was part of the information that was considered, this type of criminal charges. The information that was in front of the IJ was also information that ICE was aware of as well.

THE COURT: I see.

Thank you.

I hesitate to ask this question of each side and yet I will. I have been receiving daily letters from everybody. Do I have everything? The most recent letter that I received was the petitioner's letter in response to the government's letter and that was received a few hours ago.

Ms. Austin, is there something else from you that I should know about? Because I don't want to decide this without having all the documents with me.

MS. AUSTIN: No, your Honor. It is a fast-moving case. It is a case in which there are requests, you know, being made to ICE and, obviously, now potentially an appeal in the bond hearing. So, as you have observed, I think our ability to update you on the underlying events in the case is basically limitless. But I think you have before you at this point the crucial information for the purposes of this motion.

THE COURT: Thank you.

Ms. Friedman, is there additional information or letters that you have sent me that I didn't know to look for before signing on to this conference?

MS. FRIEDMAN: No, there is nothing else for the government. The government believes that all of the issues have been well aired in the briefing, in oral argument, and the subsequent letters.

THE COURT: I will go with thoroughly. I will decide whether thoroughly and well equate in a moment.

Give me a moment, please, to look at my notes and make sure I don't need to add anything based on the conversation I've just had with you.

This will be an oral decision. It won't be a short one, although I'll try. If you are not sitting down, please sit down and make yourself comfortable for this.

I'm also going to ask you to excuse me in advance because it is more important to me that I properly deliver my decision and less important to me that I make eye contact with you as I'm doing so. If I end up staring down for the next 20 or so or more minutes, take no offense, please. Just excuse me while I make sure I don't have to add anything.

I will begin.

Let me begin by thanking you each of you, and the three of you have done so much work on this, for the work that

you've done on a compressed schedule on these very significant issues. I was thanking the government for providing me up-to-date information regarding the dates before which Mr. Castillo would not be deported. I also want to thank both sides for providing me updated information about matters that have developed in the other proceedings in the case.

I recognize, under the schedule most recently submitted to me by the government, that I still have time to think about this. But I will be painfully candid with you. I have thought about little else but this case for the past couple of days, and I've come to the point of realizing that additional days are not going to provide me greater clarity.

That is because -- and I can say this, and you don't have to agree with me, but maybe quietly you do -- this case implicates a number of legal issues for which there is no clear guidance from the Supreme Court or the Second Circuit. I have done my best to be faithful to the law, but as you will see, there are issues I've identified as to which the relevant precedents are in conflict, and there are issues as to the which the relevant precedents hint at but do not supply an answer.

It is the rare district judge who looks forward to being appealed. I am not that judge. There are reasons for me to hope that I am not appealed here. But if I am, a possible good that can come from this case, and from that appeal, is the

clarity that each of the participants to this litigation, including myself, deserve on these knotty jurisdictional, constitutional, and statutory issues.

For reasons that I will now explain, I am granting petitioner's motion for preliminary injunctive relief, in the form of staying his removal from this country so that he can pursue his motion to reopen the case with the BIA and, potentially, a petition for review with the Second Circuit and so he can apply for renewal of his DACA eligibility.

On that latter point, because of the policy identified by the parties that forecloses consideration of such renewal while petitioner is detained, I am granting relief pursuant to *Mapp v. Reno* to this extent. I will release Mr. Castillo on a bond so that he can seek DACA renewal. And it may be that this release permits him to address other aspects of his immigration litigation more easily. But it is the DACA renewal that, to me, necessitates his release under *Mapp*.

If his DACA renewal request is denied, and if he runs through his appeal process or if that appeal process does not require him not to be detained, I will listen to the government if they then move again for his redetention. My point is, he's out because you've told me that he can't apply for DACA renewal while he's out. If that matter comes to its resolution, then I will reconsider as appropriate.

I will speak only very briefly about the factual

background because each of you is intimately familiar with it. The petitioner came from Honduras at age 7 in approximately 2002. His parents were here under a temporary protected status for which he is not eligible. He has been subject to a final removal order since 2004. He did have DACA status from 2012 to 2019 but did not thereafter review. He was detained by the NYPD in December of 2019 and turned over to ICE, I am told, in violation of local detainer law and held in ICE custody since then. There was a motion to reopen the removal proceedings that was denied by the immigration judge in January 2020. The BIA dismissed the appeal in October 2020, and there was no appeal to the Second Circuit.

He is currently held at the Hudson County Correctional Center in New Jersey. There was a motion to reopen removal proceedings pending before BIA since January 28 of 2021. It claims, among other things, ineffective assistance of counsel in the prior motion-to-reopen proceedings. The BIA has not decided the motion to reopen, but they have denied the stay of removal. This habeas petition was filed on January 29 of 2021. Since then, ICE has denied requests for release from custody pending resolution of the motion to reconsider or to reopen.

There are four claims brought in the habeas petition. The first is a violation of constitutional, statutory, and regulatory rights to adjudication of the motion to reconsider and to reopen removal proceedings for persecution-based claims.

There is a claim of violation of constitutional and statutory rights adjudication of the parole request and DACA protection.

There is a claim of violation of agency policy protecting petitioner from imminent deportation. It is a claimed violation of the Administrative Procedure Act. And there is a request for release pending adjudication, pursuant to *Mapp v. Reno*.

The instance preliminary injunction motion seeks an injunction of removal, a stay of removal pending adjudication of the habeas petition, as well as release on bail under *Mapp*. The government has asked for denial of petition on the merits and denial of the preliminary injunction motion as mooted by the denial of the petition on the merits.

I am going to begin by speaking of the preliminary injunction standards. I would say that's the parties' first dispute. I guess that's the first dispute that's coming up in the resolution of this motion.

The government is arguing for the strictest standard, which requires a showing of clear or substantial likelihood of success on the merits. This is based on the theory that the relief the petitioner seeks would either alter the status quo or provide the ultimate relief sought in the petition.

I just want to pause and recognize that I know the government actually wishes that I dispense with this motion

entirely, acknowledge that I lack jurisdiction to consider the petitioner's claims, and separately lack venue for his fourth claim, and deny and dismiss the habeas petition. But as I'm about to explain, I'm not prepared to do that on this record, where petitioner has claimed to be mounting only noncore claims, and I will instead consider the petitioner's motion.

The petitioner himself is arguing for a lower standard, which requires a showing of a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with the balance of hardships tipping decidedly in petitioner's favor. Ultimately, I'm adopting the serious-questions standard, but I want to explain to you how I get there because it wasn't evident to me and it may not be evident to you.

To begin, I don't believe that petitioner is seeking a mandatory injunction, but rather a prohibitory injunction. The difference being that the prohibitory injunctions maintain the status quo and the mandatory injunctions alter it. There are many cases for this proposition. Just one is *North American Soccer League, LLC v. U.S. Soccer Federation*, 883 F.3d 32, a Second Circuit decision from 2018, citing *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, a Second Circuit decision from 1995.

It is true that a mandatory preliminary injunction, because it alters the status quo, requires the movant to meet a

heightened standard of a clear or substantial likelihood of success on the merits and a strong showing of irreparable harm. I'm quoting there from *People ex. rel. Schneiderman v. Actavis PLC*, a Second Circuit decision from 2015 reported at 787 F.3d 638.

But the statute quo, as I understand it, is often defined as the last actual, peaceable uncontested status which preceded the pending controversy. And that is from *Mastrio v. Sebelius*, 768 F.3d 116, a Second Circuit decision from 2014. My understanding, therefore, of the status quo, as this is defined, is the situation in which petitioner was neither detained nor subject to removal.

It is true as well that a heightened standard has also been required where an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if defendant prevails at a trial on the merits. That is the *Doherty* case I mentioned a few moments ago. It is echoed as well in *Yang v. Kosinski*, 960 F.3d 119, a Second Circuit decision from 2020.

I think one can fairly argue that granting petitioner's application for injunctive relief would provide him with substantially all of the relief he seeks in the petition. I find that the second prong is not met because if the government prevails, the petitioner can be redetained and can be placed back in removal proceedings.

The more complicated issues stem from the fact that the petitioner is challenging government action. It is ordinarily the case in the preliminary injunction setting that a preliminary injunction can be granted where a party establishes either that it is likely to succeed on the merits or that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, with the balance of hardships tipping decidedly in favor of the moving party. There I'm citing to *Otokoyama Co. Ltd. v. Wine of Japan Import, Inc.*, 175 F.3d 266.

However, "when a preliminary injunction will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the moving party must demonstrate irreparable harm absent injunctive relief, a likelihood of success on the merits, and public interest weighing in favor of granting the injunction." I am quoting there from *Agudath Israel of America v. Cuomo*, 983 F.3d 620, a Second Circuit decision from 2020. Similar sentiments are in the cases of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 from 2008, and *New York v. United States Department of Homeland Security*, 969 F.3d 42, a Second Circuit decision from 2020. And in this setting the substantial questions or the serious questions standard ought not be used.

I wanted to understand the parameters of this particular body of law. So I did what I will colloquially

describe as a deep dive into these cases, going back to *Medical Society of the State of New York v. Toia* from 1977, and *Hamilton Watch Co. v. Benrus Watch Company* from 1953. What I've learned is that the standard is often cited, but it is not always followed and not followed with perfect consistency. That particular fact was discussed by the Second Circuit in the case of *Trump v. Deutsche Bank AG*, 943 F.3d 627. I recognize that the case was reversed by the Supreme Court, but on other grounds.

The Court there examined what it termed the government action exception to the use of the serious-questions standard. In its discussion it recognized that, despite repeated citations to the more restrictive standard, the Court had in two decisions affirmed preliminary injunctions against government action issued using the less rigorous serious-questions standard. Those two cases were *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, a Second Circuit decision from 1992, enjoining the INS, and *Mitchell v. Cuomo*, 748 F.2d 804, a Second Circuit decision from 1984, enjoining state prison officials.

Also in the Trump decision, the Second Circuit acknowledged that it had sometimes affirmed decisions that issued or denied preliminary injunctions against government action using both standards.

As it happened, the *Trump* court ultimately adopted the

more rigorous likelihood-of-success standard to the challenges to subpoenas issued by a congressional committee, but then it ended up deciding the matter under both standards. It's the Court's discussion of competing public interests that informs my decision here.

The Court discussed the *Haitian Centers* case and then the original case on which it relied, which was *Plaza Health Laboratories v. Perales* from 1989. And what it concluded was that *Haitian Centers* had found that no party had an exclusive claim on the public interest. It is actually a quote from the *Haitian Centers* case. And that point later influenced, it appeared, in the Court's decision in *Time Warner Cable of New York City LP v. Bloomberg L.P.*, where the Court found, in noting that there were public interest concerns on both sides of the litigation, they found that the serious-questions standard would be applicable even though the case was ultimately decided under the likelihood-of-success standard.

Here, in this case as well, I have identified and the parties have identified for me public-interest concerns on both sides. I recognize that petitioner is challenging a statutory framework that was implemented with due regard for the executive branch's primacy in immigration matters. But the record reflects competing governmental interests at a federal level, and strong countervailing governmental interests at the state and local level.

First, I note that this dispute is taking place against the backdrop of a change in administration and a consequent reconsideration of federal immigration policies. That includes the DACA program as to which petitioner seeks renewal, and the policy that forecloses his renewal while he is detained. I recognize -- I want to make clear that I recognize that DACA status is not an entitlement.

But the current administration has recognized that the DACA program is a government priority and the government's prioritization of that program is itself a strong countervailing Federal Government action in the public interest.

Petitioner was formerly eligible, and might be eligible still, and, thus, there is a countervailing interest in allowing petitioner to pursue this program. I am not in this regard bound by respondent's decision not to grant petitioner parole to pursue the program. It remains a priority for the new administration.

Additionally, although respondent argues that petitioner is challenging government action taken in the public interest, the petitioner has pointed to developments that complicate this picture.

At oral argument petitioner highlighted three governmental actions that suggested that there are more complicated, more nuanced public interest concerns than

petitioner's removal pursuant to the INA. And these include the January 20 executive order and memo, the February 2 executive order, and the February 18 memo.

The January 20 memorandum, for example, demonstrates that the government prioritized a moratorium on deportations, and the petitioner would fall within that moratorium. The government maintains that petitioner is not entitled to relief under any of these memos or executive orders or policies.

But, more generally, these statements suggest that this is not simply a case where the government's sole interest is removing people pursuant to the INA. Rather, the government has expressed an interest in implementing the INA in a certain way by establishing enforcement priorities, and petitioner is challenging the application of the government's stated priorities to his case.

While petitioner may not be entitled to an order directing the government to prioritize exercise of its enforcement discretion in a particular way, these statements of the government's enforcement priorities suggest that a more nuanced view of government action in the public interest, with that phrase in quotes, is warranted than is asserted by respondents and reinforce that there are public-interest issues on both sides.

Second, and separately, New York City and the State of New York have articulated strong countervailing interests in

petitioner's favor. Petitioner has received a letter from the Law Department of the City of New York, relating that petitioner had been turned over to ICE in violation of the City's detainer law. And New York State has publicly expressed a strong public interest against the removal of individuals like petitioner, for example, in its amicus brief in the Texas litigation, mirroring the Federal Government's own priorities, as articulated in the January 20 memo and the executive order.

The *Trump* court noted, and the cases it cited were the *Time Warner* case and the *Hatian Centers* case, that where there are public-interest concerns on both sides of the litigation, the serious-questions standard would be applicable. And for these reasons, and on what I believe to be the rather unique facts of this case, I am using the serious-question standard.

And what I'll do now is to explain why I find why that there are substantial or serious questions regarding my own jurisdiction to hear this case and regarding petitioner's due process issues.

I will note, in the issue of jurisdiction and other sort of opening issues, I don't believe the venue issues are an issue in this case. I do have my view regarding core and noncore claims, and that was set forth in the case of *Gomez v. Decker*, but I also agree that noncore claims can be brought in a legal custodian district, such as the Southern District of New York, and I've been advised that petitioner is arguing only

noncore claims here, so I don't find a venue problem.

The larger issue for me is the issue identified by respondent about whether I have jurisdiction to review petitioner's claims. For that I turn to Section 1252 of Title 8 of the United States Code, which is the section of the INA that covers judicial review of removal orders. I'm also looking at the amendments over time and the court cases interpreting it.

After doing that, I conclude that there are substantial or serious questions that both prevent me from dismissing the petition outright and that satisfy the serious-questions prong of the preliminary injunction standard.

Beginning at the beginning with the Real ID Act, in 2005, after the Supreme Court's decision in *INS v. St. Cyr*, Congress amended the statute to expressly include habeas review under 2241 in the forms of prohibited judicial review of removal orders, thereby superseding that portion of *St. Cyr*. And Section 1252(a)(5) provides, in essence, for a pipeline that begins with the immigration judge, goes next to the BIA, and next to the Court of Appeals.

The Second Circuit has construed this provision broadly to preclude district courts from exercising subject matter jurisdiction over an action that even indirectly challenges an order of removal. As one case for that proposition I cite *Delgado v. Quarantillo*, 643 F.3d 52, 55, a

per curiam Second Circuit decision from 2011.

But the parties have focused on 1252(g). I won't read all of it into the record, because the parties are so familiar with it, but in large measure the focus is on this part. No court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The intended effect of this provision is to strip district courts of jurisdiction, to hear removal order-related claims that ought to be funneled through the BIA to the circuit court, in accordance with subsection (a)(5).

The issue, however, is that the Supreme Court itself has said that the language in 1252(g) does not sweep in any claim that can technically be said to arise from the three listed actions of the Attorney General. Instead, we read the language to refer just to those three specific actions themselves: Commencing proceedings, adjudicating cases, and executing removal orders. That is from the Supreme Court's decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 from 2018, and it, in turn, is relying on a case cited to me by the parties, *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 from 1999.

So the issue and the question before us is whether a suit brought against immigration authorities is or amounts to a

challenge to a removal order. Many courts have found in this district that it is not per se a challenge to a removal order, and whether it is or not turns on the substance of the relief that plaintiff seeks. One of many cases for that proposition, *Vidhja v. Whitaker*, 2019 WL 1090369.

The *Vidhja* case notes, and it is true, that numerous courts in this circuit have held that a request for a stay of removal constitutes a challenge to a removal order, and that, accordingly, district courts lack jurisdiction to grant such relief. But other cases have found that subsection (g) doesn't preclude jurisdiction under certain circumstances, including the *You* case, 321 F.Supp. 3d 451, or *Calderon v. Sessions*, 330 F.Supp. 3d 954.

Of the courts that have decided that 1252(g) does not strip jurisdiction to hear habeas petitions under certain circumstances, some have read the provision not to apply to challenges to the legal authority to remove in a general or in a particular way, and others have acknowledged that the provision might apply to nondiscretionary decisions, but must be read not to apply, so as to avoid constitutional problems. The *S.N.C.* decision that we have discussed at oral argument and the *Siahaan* decision that we discussed at oral argument also speak to these issues.

Related or interrelated with this question of the scope or interpretation of 1252(g) is the issue of reading

1252(g), as respondents request that I do, would run afoul of the suspension clause. And in that regard I have considered the principal Supreme Court cases on the issue, as well as the most recent Court of Appeals decision.

We begin with *INS v. St. Cyr*, which I mentioned earlier. However, that case was, as noted, superseded by the Real ID Act. It noted in that case, and this has consequences for later analysis that, at the absolute minimum, the suspension clause protects the writ as it existed in 1789.

After *St. Cyr*, there was *Boumediene v. Bush*. I know it was not an immigration case, but it was nonetheless significant in that it listed requirements or gave ideas and guidance on requirements for adequate and effective substitutes in lieu of habeas, which were designed to avoid suspension clause problems, and it discussed minimum criteria for substitute procedures.

And then, most recently, we have had *Department of Homeland Security v. Thuraissigiam* from last year, and it's the case on which the parties have focused the most. It was an immigration case. It concerned the availability of habeas relief to challenge expedited removal orders, where the applicable jurisdiction-stripping provision was Section 1252(e).

In that case, however, again, the focus was on Founding Era precedent. Justice Alito, writing for the Court,

claimed that the petitioner had so conceded. I actually went back, and I don't think that was the case, but that is what he found.

It doesn't purport to decide whether the scope of the habeas writ has expanded since the Founding Era. It does suggest that the suspension clause only applies to core habeas claims, as understood at the Founding Era, and it summarily dismissed due process arguments, asserting that petitioner had no due process rights because he was effectively stopped at the border.

There are differences though. Let me say this. I recognize that there is language in *Thuraissigiam* that would seem to doom petitioner's claims. There is language, for example, that the relief sought might fit an injunction or writ of mandamus, but falls outside the scope of the common law habeas writ.

But here, unlike in *Thuraissigiam*, Mr. Castillo, the petitioner, is not asking this Court either for vacatur of his removal order or for a directive of any kind to the BIA. Rather, he's seeking merely to be permitted to remain in this country while his motion to reopen proceeds through the BIA and possibly to the Second Circuit.

That said, it seems to me that his request for the Court to direct ICE to follow parole request procedures would seem to fall within the scope of that paragraph or that

language in *Thuraissigiam*.

Thuraissigiam also noted that simply releasing Mr. Thuraissigiam would not provide the right to stay in the country that his petition ultimately seeks. Without a change in status, he would remain subject to arrest, detention, and removal.

But here, by comparison, releasing Mr. Castillo would give him the chance to pursue DACA relief and would make his opportunity to obtain relief through the motion-to-review and the petition-for-review process considerably more meaningful.

I have looked at other cases, both pre and post *Thuraissigiam*. Justice Alito speaks of the case of *Heikkila v. Barber*, 345 U.S. 229 from 1953. That case itself assumes that the constitutional scope of the writ covers collateral attacks on deportation orders. I think Justice Alito may have misspoken or misperceived that in the *Thuraissigiam* decision, but I leave that for someone else to ultimately determine.

There are also cases, pre and post *Thuraissigiam*, discussing whether the motion to reopen proceeding is an adequate and effective substitute. What is interesting to me is that in several of these cases they have distinguished their case from situations in which the petitioner not only could not be removed before the motion was adjudicated, but also had a credible fear of persecution or torture in the country of removal, such that he may not have an opportunity to file or

have adjudicated a postremoval motion to reopen. I am quoting here from the case of *Barros Anguisaca v. Decker*, 393 F.Supp. 3d. This pinpoint cite is at 352, and it lists a series of cases. I do think that this case before me is and fits within those circumstances.

The *Joshua M. v. Barr* case from the Eastern District of Virginia, the *Siahaan* case that I mentioned earlier, were cases in which district courts had concluded that threats of physical injury within a country of removal undermined the ability to effectively prosecute claims before the BIA and to bring a petition for review to a circuit court from the removed country and, therefore, made the process an inadequate substitute for habeas relief.

I will just note in that regard as well that the Sixth Circuit's decision in *Hamama v. Adducci*, in particular, the dissenting opinion of Judge White noted that protection against the executive action of removal is within the recognized scope of habeas, and the petition for review procedure provides an inadequate substitute for habeas under the circumstances presented here, which are akin to the ones in this case. And the district court, therefore, properly exercised jurisdiction over that claim.

Looking at those cases, they still left open the possibility that there were situations in which either 1252(g) ought not apply or, if it did apply, there would be suspension

clause issues for which there was not an adequate and effective substitute.

I recognize that post-*Thuraissigiam* the circuit courts that have decided the issue have not found suspension clause issues. But with appropriate respect to those circuits, I found that the reasoning didn't engage fully with the issues that the parties have brought to my attention in this case, and so I note them. But it doesn't detract from my ultimate conclusion that there is a substantial or serious question on the issue.

These cases include *Gicharu v. Carr* from the First Circuit, reported at 983 F.3d 13; *EFL v. Prim*, the very recent decision from the Second Circuit contained at 2021 WL 244606; and *Tazu v. Attorney General*, 975 F.3d 292, a Third Circuit decision from 2020.

Tazu, in particular, I find not persuasive because having told me that there is no problem and there are no due process issues, it then ends by saying, and I quote, "fortunately, his removal is already stayed before the Second Circuit. We trust that he will be able to stay here with his family while he seeks relief." As precedent, that helps me not at all.

Ultimately, and I thank you for your indulgence as I went through that case law, I find substantial questions regarding whether 1252(g) strips me of jurisdiction, and if so,

whether such jurisdiction stripping would violate the suspension clause.

To begin, I find that the courts' disparate constructions of the scope of 1252(g) itself both prevents me from concluding that I lack jurisdiction and raises a substantial question as to whether the bar even applies in this case. The plain text of the statute would seem to cover a broad range of proceedings. But the Supreme Court in *Jennings* instructed courts to read the provision narrowly and not literally. How narrowly is an open question that has led courts to differing conclusions, often influenced, whether expressly acknowledged or not, by the canon of constitutional avoidance, and I cannot say with certainty that that statute operates to strip me of jurisdiction.

If I did, I would proceed to the next level of substantial or serious questions, addressing suspension clause issues, and this conclusion proceeds from two findings: (i) there is support in the case law for holding that the writ has evolved since 1789 and extends to this situation, such that the suspension clause would apply; and (ii) the statutory channeling of claims from the immigration judge, to the BIA, to the circuit Court of Appeals, is an inadequate substitute for habeas on the facts of this case.

Let me speak first about the support in the case law. The cases that I mentioned from the Supreme Court, *St. Cyr*,

Boumediene, and even *Thuraissigiam*, acknowledged, through use of their "at a minimum" language, that the Court was discussing the writ as existed in 1789. But this repeated use of qualifying language suggests that the writ is or could be broader than what had been outlined in those decisions. The *Heikkila* Supreme Court decision and the *Hamama* dissent, to which I referred above, presented evidence from the founding period and beyond regarding a broader conception of the writ to which the suspension clause would apply.

On the issue of what qualifies as an adequate and effective substitute, I'm drawing my instruction from the Second Circuit's decision in *Luna v. Holder*, and there are several factors that are called to my attention.

One is that the purpose and effect of the substitute was to expedite consideration of the detainee's claims and not to delay or frustrate it. One is that the scope of the substitute procedure ought not be subject to manipulation by the government. Third, a mechanism for review that is wholly a discretionary one is an insufficient replacement for habeas. And, fourth, the entity substituting for a habeas court must have adequate authority to formulate and issue appropriate orders for relief, including the power to order the conditional release of an individual unlawfully detained.

The petitioner has argued here that the existing statutory scheme does not satisfy these requirements, at least

on the facts of this case. I conclude that these arguments raise a substantial question regarding my jurisdiction and regarding the constitutional problems that would adhere if Section 1252(g) were found to bar jurisdiction here.

The BIA handling of stay-of-removal requests is, it has been submitted to me, opaque and rushed. It is unclear what the standards are for granting or denying a stay, and it is argued that it yields arbitrary results. I have also been presented with an amicus brief in the *Ixcoy Caal v. Decker* case making that point as well.

Another complaint is that the stay request and the motion to reopen are not handled together, creating what at least one court has called a jurisdictional no man's land.

A third challenge is that the petitioner is likely to be removed before he has the chance to petition the Second Circuit for a stay, thereby undermining the effectiveness of the alternative process. It doesn't provide relief from the underlying executive action, which is removing him to a country where, petitioner alleges, he faces a risk of persecution and violence.

For these reasons, I am finding substantial questions dealing with 1252(g) itself. I am also finding substantial questions regarding the procedural due process to which petitioner is entitled.

Now, petitioner argues that he has a right under the

Fifth Amendment due process clause, to adjudication of his motion to reopen and his parole request before he is removed. Many of the arguments are ones I have just repeated, that it is unlawful to deport people before they have had a full and fair opportunity for review particularly in the asylum and CAT context, the jurisdictional no man's land argument, and that the ability to get a stay of removal from an IJ or the BIA is inadequate to protect one's rights because the process results in arbitrary and capricious decisions and no ability to appeal a stay of the denial to the circuit court before a final decision on the motion to reopen.

Ultimately, I do conclude that these do raise serious or substantial questions regarding the due process rights.

The Fifth Amendment's due process clause mandates that no person shall be deprived of liberty without due process of law. This clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. I am quoting here from *Zadvydas v. Davis*, 533 U.S. 678, a Supreme Court decision from 2001, and *Thuraissigiam* itself confirms that aliens who have established connections in this country have due process rights in deportation proceedings.

The next issue, therefore, is whether there is a cognizable liberty or property interest. Petitioner has suggested to me that there are. He has cited a liberty

interest in remaining in the United States, a statutory right to move to reopen his proceedings, and an entitlement under law to not be deported to a country where persecution would occur.

The fundamental requirement of dues process is the opportunity to be heard at a meaningful time and in a meaningful manner. I quote there from *Mathews v. Eldridge*, 424 U.S. 319 from 1976.

The adequacy of these procedures is a function, in part, of the magnitude of the interest at stake and the likelihood of erroneous deprivation.

In the Second Circuit's decision in *Hechavarria v. Sessions*, the Court noted that the statutory procedural protections of judicial review and stays are essential tools in meeting the government's constitutional obligation to provide procedural due process for immigrants facing removal. Our power and obligation to participate meaningfully in the statutory scheme, as structured by the Constitution, is a foundational element of our analysis in this appeal.

Turning now to the application of these principles to the facts of this case.

I conclude that the deportation of the petitioner before he is able to file a petitioner for review at the Second Circuit makes the opportunity for judicial review by the Second Circuit less meaningful.

There is also the distinct possibility that he will

suffer -- in fact, he will suffer irreparable harm in the meantime, not merely the threat of harm to himself, in Honduras. But the foreclosure of his eligibility for DACA renewal.

I would also like to reiterate and remind the parties of the concerns I just raised with respect to the suspension clause analysis regarding how BIA stay request review works and whether it is sufficient to protect against the erroneous deprivation of liberty.

I'm also persuaded by the analysis of a district court in California, to be sure, in *Chhoeun v. Marin*, 306 F.Supp. 3d, 1147, noting there that the requested injunction would ensure that petitioners have adequate time and opportunity to access the system that has been constructed to prevent erroneous removals. It is a system that includes the thorough exhaustion of an administrative process and judicial review by the appropriate Court of Appeals. The Court finds that the requested procedural protections are necessary to comport with due process. So I do find substantial question as to the scope and operation of 1252(g) and the due process issues raised by petitioner.

I want to just note, for completeness, that there is a third argument that I do not find to be a substantial question. That is the argument that petitioner has made that removal would violate the 100-day moratorium and DHS' own enforcement

priorities and that the injunction issued in the Southern District of Texas should not apply to him.

This particular challenge would seem to me to be barred by 1252(g) and not appropriately a subject of the *Accardi* doctrine or a claimed violation of the APA to circumvent that bar.

The February memorandum recited that it may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. More pointedly, the memorandum makes clear that it enjoins blanket removal, but it leaves DHS with the discretion to pursue removal in individual circumstances. Based on the submissions of the parties and the representations made to me in oral argument, I'm confident that DHS did not misperceive its discretion in placing or replacing the petitioner in removal proceedings.

Nonetheless, I do find serious questions on the other two areas, the scope of the writ and how it interacts with the suspension clause, and the possibility of due process issues.

Having found that, and I realize -- I promise you, for a moment of levity, that the rest of this is a lot shorter. But having found this issue, I focused the most time on the merits issue, on the substantial questions issue, because it has the most complexities. But petitioner must also demonstrate that the balance of hardships tips decidedly in his

favor, and on that I find that it does.

The Second Circuit has shown or has held, excuse me, that a showing of irreparable harm is the single most important prerequisite. I'm quoting from the *Yang* decision I mentioned earlier. To demonstrate irreparable harm, the movant must demonstrate that they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of the trial to resolve the harm. I'm quoting there from *Faiveley Transportation Malmo AB v. Wabtech Corporation*, 559 F.3d 110, a Second Circuit decision from 2009.

I accept the petitioner's arguments in this regard that removal prior to adjudication of his motion to reopen would violate his due process rights, and that there would be a presumption of irreparable injury that flows from a violation of constitutional rights. It would make him ineligible for DACA. It would render him vulnerable to the risk of persecution and harm in Honduras, and there is a personal cost of being separated from his family in the United States.

A lot of these irreparable harm issues flow naturally into the question of the balance of equities and the public interest, and for this reason I find as well that the balance of equities tips decisively and decidedly in petitioner's favor.

There are other issues, though, including the medical

issues that have been identified by petitioner's counsel. There is also a public interest in the constitutionally sound and fair administration of the immigration laws. There are completing public interests in terms of New York City's detainer law and New York State's interest as expressed in its amicus brief.

And, conversely, it is not as evident why there needs to be such a rush to remove petitioner at this time, particularly since he does not seem to fall within the administration's enforcement priorities set forth in the various memoranda that were identified last week.

I have reviewed the government's letter of yesterday discussing the circumstances of the dropping of the criminal charges against petitioner. The fact of his arrest, however, does not affect my decision. I had a reference to allegations that were dropped. I have no evidence substantiating them.

I do want to make clear what I am and am not doing here. In granting injunctive relief I am not saying that petitioner is entitled to have this case reopened by the BIA. I am not saying that he is entitled to DACA eligibility renewal. All that I'm saying is that he has raised sufficiently meritorious legal issues and that he has presented sufficiently compelling evidence on the remaining factors of the preliminary injunction analysis that he should not be removed from this country by undertaking those efforts.

Related to this issue is the question of *Mapp* relief. The Court has inherent authority to grant bail to habeas petitioners when the petition raises substantial claims and extraordinary circumstances make the grant of bail necessary to make the habeas remedy effective. I am quoting there from the decision itself.

The *Mapp* holding has been affirmed and extended post Real ID Act. It's done so in the first instance in *Elkimiya v. Department of Homeland Security*, 484 F.3d 151, a Second Circuit decision from 2007, and the *S.N.C.* district court decision from 2018 also makes reference to it.

I find that petitioner has raised substantial claims. More pointedly, I am advised that he cannot effectively apply for renewal of his DACA eligibility or relief while detained and that bail is necessary to permit him to do that. ICE has denied his parole request, and he was not granted bail earlier this week.

There are certain medical issues that I understand may not be or may not be as well addressed while he is detained. I do recognize that severe health issues have been a basis for *Mapp* relief in the past, and this happened particularly last year in the context of certain habeas requests that were occasioned by the COVID-19 pandemic.

They are not the principal basis for the relief that I am awarding. I am expecting that the medical issues of which

petitioner complains will be addressed very promptly upon his release.

As I noted earlier, and want to underscore again, I am granting *Mapp* relief in order to allow petitioner to pursue his DACA renewal. I recognize that the effect may be to ease other burdens that he has, his medical issues or his immigration litigation more broadly. But I'm granting the relief to allow the DACA process to proceed. If that concludes before the motion to reopen is resolved, that may well amount to changed circumstances warranting the resumption of petitioner's detention.

That is my resolution of the preliminary injunction motion. There are a few sort of miscellaneous matters I want to address with the parties.

Again, perhaps reflecting my experience, which may be different from all of your experiences, I would expect the parties would be able to agree on the conditions of a bond for Mr. Castillo's release. It was not my intention to just let him out with no conditions whatsoever. So my hope would be that I could allow a period of time that would be sufficient for the parties to either come to a decision or to come to me with your competing proposals and let me decide. That's what I am proposing for the parties.

Related to that, I'd like to just address Ms. Friedman for a moment.

Ms. Friedman, if this is a matter where the government wishes to appeal and wishes to prevent Mr. Castillo from ever leaving the facility, I am prepared to stay my decision for a couple of days because I do think -- I want to give the parties -- let me say this. As I am staying this decision, what I'm expecting is that the parties will get together and figure out bail conditions and/or the government will appeal to the circuit and ask for what I've done today to be undone.

Ms. Friedman, I realize I am springing this on you with no notice, but it was my intention to stay the effect of my decision or -- in other words, that Mr. Castillo was not getting out before Wednesday of next week -- to give everybody a chance to propose a bond and to give the government a chance to decide whether it wants to appeal.

Ms. Friedman, beginning with you, is there any reason why I may not do that?

MS. FRIEDMAN: I am not aware of any, your Honor. ICE has already committed that he will not be removed prior to that date anyway, so I'm not aware of any.

THE COURT: Ms. Friedman, on my larger point about you and your adversaries consulting about a bond, you heard me mention last year, and last year during the height of the early pandemic, I had discussions with members of your office regarding meetings to propose bonds for folks who were detained at the Orange County Jail. In those cases they were let out

because of very serious medical conditions, but they weren't let out on their own recognizance. There was a bond. For this reason, I thought or I think that the parties could get together and agree upon conditions.

Ms. Friedman, is that a thing that can be done or is what I'm saying completely foreign in this context?

MS. FRIEDMAN: My office has definitely had conversations where they have agreed and presented things to judges, so I definitely think we can have conversations with opposing counsel.

THE COURT: Thank you.

Ms. Friedman, is there anything that I have omitted resolving from your perspective?

MS. FRIEDMAN: I don't believe so, your Honor.

THE COURT: Thank you.

I know one of the downsides of having an oral decision is, you need to think about everything I've said and perhaps get a transcript and look at everything I have said, but I believe I addressed everything that the parties wanted me to address.

Ms. Austin, the same questions to you. I am not letting your client out the door before Wednesday, hoping that the parties can agree on a bond or the Second Circuit will do something or not do something.

Do I understand that you will be able to have those

discussions or another member of your team will be able to have those discussions with the government about the bond?

MS. AUSTIN: We absolutely can, your Honor. I would ask, given that in the past my experience in this situation is often that we diverge on at least some points, whether you would want a single letter summarizing both parties' positions, or two, and also by what date, to the extent that we do not reach agreement on full conditions. I think we could do that as soon as 24 hours from now or tomorrow afternoon, but I think we are eager to keep the process moving and give your Honor time, to the extent there is any disagreement, but we would, of course, conform with whatever schedule you set for the submission of that one or two letters.

THE COURT: I think one or two letters by end of day Monday because I'm telling myself that if you have additional time you will get that much closer to resolution. But Monday will still give me time to decide the issues. Close of business. The normal close of business hours. Not midnight, please. But that seems to make the most sense.

I've had it both ways. If the parties want to have one letter with both sets of positions, fine. If you want two letters, fine. I'm agnostic on the issue. I just want everyone's views on things.

Ms. Austin, this second line of questioning is, from your perspective, is there anything that I have left open?

MS. AUSTIN: I don't believe so, your Honor.

To the extent that there is anything logistical, I think we could include it in our letter as far as the logistical steps necessary for a district court to enter a bond. That's been somewhat difficult to effectuate in the past, but we can incorporate that into our discussions with the government and address any issues in our submission.

THE COURT: I know I've done it, because I know I've done it last year, and I know a number of my colleagues have done it last year, with particular respect to the Orange County Jail. So I'm assuming something similar could be put together, and I will let you speak with your colleagues and see what that is. Again, I just did not want to leave anyone with unresolved issues.

Ms. Austin, from your perspective and your colleague's perspective, is there anything else to address in this proceeding?

MS. AUSTIN: I don't believe so, your Honor.

THE COURT: Ms. Friedman, is there anything else to address in this proceeding?

MS. FRIEDMAN: No, your Honor.

THE COURT: I thank you all very much. I thank you in particular for your patience as I reviewed the oral decision.

Be well each of you. We are adjourned. Thank you.

(Adjourned)